88-833

No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

DOMINIC MARIANI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212) 486-1717

On the Petition
JUDD BURSTEIN
757 Third Avenue
New York, New York 10017
(212) 826-1200

QUESTIONS PRESENTED

1. Whether a conflict among the Circuit Courts of Appeal, as to whether the immunity statute, 18 U.S.C. §6002, permits the non-evidentiary use of immunized testimony, should be resolved by this Court?

LIST OF PARTIES

Apart from petitioner, the other parties involved in the trial from which this petition results were Philip Rastelli, Nicholas Marangello, Joseph Massino, Carmine Rastelli, James Vincent Bracco, Charles Martelli, Charles Agar, Anthony Cantatore, and Warren Weissman.

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DOMINIC MARIANI,
Petitioner,
-against-
UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Dominic Mariani respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on July 11, 1988, reversing the District Court's dismissal of the RICO indictment against him on the ground that the prosecution had made use of Mariani's immunized grand jury testimony.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *United States v. Mariani*, 845 F.2d 595 (2d Cir. 1988), is reprinted in the Appendix at pages 1a-14a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 15a-16a. The initial opinion of the District Court appears in the Appendix at pages 17a-30a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 11, 1988. A timely petition for rehearing was denied on September 20, 1988, and this petition for a writ of certiorari has been filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 18, United States Code:

§ 6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --
>
> (1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

Dominic Mariani petitions this Court following the reversal of the trial court's dismissal of an indictment against him. The trial court's decision came after a trial that had ended in conviction. The Court of Appeals' decision thus reinstated the four year term of incarceration that had been imposed upon petitioner pursuant to that conviction. In reaching its decision, the Court of Appeals rejected a rule of law that is well established in at least four other Circuits.

This case involves the application of unusual facts to familiar legal principles. Fifteen years ago, this Court held that where the government seeks to prosecute an individual who has previously testified under a grant of use immunity, the government has a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar v.*

United States, 406 U.S. 441, 461-62 (1972). This case poses the question of what the government must show in order to demonstrate that it has honored *Kastigar*'s "total prohibition" on the use of the immunized testimony. *Id.*, 406 U.S. at 460.

In the normal case, the government's burden is met by a demonstration (1) that the government's evidence against the defendant is derived from sources wholly independent of his prior immunized testimony, and (2) that the prosecutors in the case, either through the erection of a "Chinese wall" or by virtue of the fact that different prosecutorial offices were involved, had no access to the immunized testimony. *See, e.g., United States v. Romano*, 583 F.2d 1, 8 (1st Cir. 1978); *United States v. Smith*, 580 F.Supp. 1418, 1433 (D.N.J. 1984). Here, in contrast, Laura Brevetti and Alan Friedman, the prosecutors who were present when Mariani testified under immunity in the grand jury, were the same prosecutors who (1) made the initial decision to pursue an indictment of Mariani, and (2) tried the case against Mariani. As we show below, the consistent presence of these prosecutors throughout this case invalidated Mariani's indictment.

This is not to say that anytime a prosecutor is exposed to a defendant's immunized testimony, dismissal of the indictment must result. As we discuss below, and as the trial court held, there is no such *per se* rule. On the other hand, it is not enough, as the government did here, simply to state that no use was made of the defendant's immunized testimony. Surely, "the prosecutor's [mere] assertion that the immunized testimony was not used is inadequate." *United States v. Nemes*, 555 F.2d 51, 55 (2d Cir. 1977). Here, the trial court made explicit credibility findings as to the government's denials,

stating that he was "not persuaded" by them. (A:429)[1] The Court of Appeals did not dispute those findings. Rather, it held that the trial court erred in assuming that *Kastigar* applies to non-evidentiary uses of immunized testimony, such as changing trial strategy or corroborating witnesses. As noted, in so holding, the Court took a position that is directly contrary to that of its sister courts.

STATEMENT OF THE FACTS

PROCEDURAL HISTORY OF THIS CASE

On August 23, 1984, Dominic Mariani appeared before the grand jury and testified pursuant to a grant of statutory use immunity. 18 U.S.C. §6002.

Subsequently, on June 13, 1985, Indictment 85-CR-354 (CPS) was unsealed. This 15 defendant, 64 count indictment alleged a broad RICO conspiracy involving the corruption of Teamsters Local 814 by various trucking companies and members of organized crime. Although the indictment claimed that Mariani, who was the owner of Washington Moving and Storage Co. ("Washington"), and later a principal of Guardian Worldwide Transport ("Guardian"), had been involved in an extortion conspiracy which furthered his participation in "bid-rigging" on government moving contracts; unlawful payments with respect to employee benefit funds; and various Taft-Hartley law violations, Mariani was not *charged* with these crimes in Indictment 85-CR-354. Rather, he was charged only with perjuring himself during his August 23,

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[1] Numbers preceded by the letter "A" refer to the joint appendix submitted on the government's appeal to the Court of Appeals; numbers preceded by the letter "T" refer to the trial transcript.

1984 grand jury testimony (Count 54). This perjury was also alleged to be an obstruction of justice. (Count 55)

In January of 1986, a different grand jury returned Indictment 86-CR-015 (CPS) against Mariani alone. This indictment, the subject of the instant petition, charged Mariani with a RICO conspiracy (18 U.S.C. §1962(d)); an extortion conspiracy (18 U.S.C. §1951); unlawful payments with respect to employee benefits funds (18 U.S.C. §1954); and Taft-Hartley law violations (29 U.S.C. §186(a)(2) and (d)).

Upon the return of the second indictment against Mariani, the government successfully moved to consolidate the two indictments for trial. At the same time, Mariani sought a pre-trial *Kastigar* hearing. At the government's request, the trial court, although finding that a hearing was required, agreed to hold this hearing after trial. At trial, Mariani was convicted on all charges against him.

On February 10, 1987 Mariani was sentenced to four years imprisonment on the various charges in Indictment 86-CR-015, and one year of imprisonment on the perjury and obstruction of justice charges in Indictment 85-CR-354.[2]

Prior to sentence, however, there was no resolution of Mariani's outstanding claim that his prosecution on Indictment 86-CR-015 was barred because it was derived from his immunized grand jury testimony. As a result, by agreement of all parties, Mr. Mariani withdrew his

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[2] Mariani's conviction on the perjury and obstruction of justice charges contained in Indictment 85-CR-354 is the subject of a pending separate appeal in the Court of Appeals. (Docket No. 87-1098)

appeal of his conviction, without prejudice to its renewal, so that a hearing could be held on this immunity issue.

Subsequently, on July 9, and July 14, 1987, an evidentiary hearing was held before the trial court. On August 17, the trial court issued an order and opinion granting defendant's motion to dismiss the indictment. The government's successful appeal followed.

THE HEARING EVIDENCE

The three witnesses who testified at the hearing on defendant's *Kastigar* motion were Laura Brevetti, Alan Friedman, and David Stone. Ms. Brevetti and Mr. Friedman were the two Organized Crime Strike Force attorneys who were present during Mariani's immunized grand jury testimony, and who tried that case against Mariani for the government. David Stone was the FBI agent through whom the government's presentation of the case against Mariani was made to the second grand jury. Stone's testimony, is irrelevant to a determination of this petition and therefore will not be discussed in this brief.

A. Laura Brevetti's Testimony

The major thrust of Laura Brevetti's testimony was to establish that the government learned nothing new from Dominic Mariani's immunized grand jury testimony. Ms. Brevetti testified that prior to Dominic Mariani's testimony, she and other government attorneys had extensively debriefed Anthony Giliberti, the chief government witness, who had entered the Witness Protection Program in July of 1982. (A:142-43) Ms. Brevetti testified that prior to Mariani's immunized testimony, Giliberti had already told the government that:

1. Mariani was an owner/operator of Washington Moving and Storage, and was also

an officer of Guardian Transport Worldwide Movers.

2. Mariani had been involved in that business for "quite a period of time."

3. Mariani was involved in both commercial and government moves.

4. At some point in the late 1970s, Mariani agreed to make payoffs to officers of Local 814, as well as to alleged organized crime member Jimmy Rotondo, in varying amounts. On one occasion, Giliberti could recall $1,000 being shared by both the officials of 814 and Rotondo.

5. In addition to Mariani, "[m]any, many other owners and operators ... agreed at some point in time also to make a five percent payoff to union officials."

6. Mariani was "a major violator of the union contract ... [and] would consistently use non-union labor when he could get away with it.

7. Mariani was constantly delinquent to the pension and welfare funds and the union was always sending him notice and threatening suit.

8. Giliberti on occasion spoke to Mariani about not signing the collective bargaining agreement and also about his use of non-union labor.

9. Giliberti caused work stoppages on some of Mariani's jobs.

(A:143-44)

Thereafter, following an appearance before the grand jury in which he asserted his Fifth Amendment privilege against self-incrimination (A:144), Mariani was granted statutory immunity and testified in the grand jury on August 23, 1984. Ms. Brevetti stated that she reviewed all of the written documents concerning the prior interviews of Giliberti "extensively" before questioning Mariani in the grand jury. (A:147) The transcript of Mariani's immunized testimony was admitted into evidence at the hearing. (A:153)

In December of 1984, following Mariani's grand jury testimony, one of Mariani's fellow truckers, Warren Wagner, agreed to cooperate with the government. According to Ms. Brevetti, "Mr. Wagner formed the center piece of the charges against Mr. Mariani." (A:149) Yet, she admitted that Giliberti's testimony was also relevant to these charges. (A:182) Ms. Brevetti testified that, prior to Wagner's debriefing, she "had no idea of the scope or breadth of the conspiracy which Mr. Mariani was eventually charged with." (A:149) According to Ms. Brevetti, only through Wagner was she able to understand the details of "the five percent plan", and that the bid rigging scheme involved Wagner, Mariani, as well as co-defendants Joseph Schwartz and Warren Weissman. (*Id.*)

Ms. Brevetti's direct testimony was pointed toward establishing that Mariani's immunized grand jury testimony had not tainted, either directly or indirectly, Indictment 86-CR-015. Ms. Brevetti testified that she did not read the minutes of Mariani's grand jury testimony when they were first delivered to her. According to Ms. Brevetti, they were kept in a file cabinet in fellow prosecutor Alan Friedman's office, and they were not given to any other agent of the United States government. (A:154-55) As for whether she discussed Mariani's testimony with Mr. Friedman, she stated that "[t]here wasn't much to discuss" because they had both been in the grand jury. (A:156) She did recall, however, telling

fellow Strike Force attorney Douglas Behm, who had previously been involved in the investigation, that she did not believe that Mariani would be helpful to them as a witness. (A:156-57)

Finally, Ms. Brevetti's direct testimony dealt with the decision to indict Mariani on charges other than perjury and obstruction of justice. She testified that Alan Friedman and she prepared the prosecutive memorandum that was sent to the Justice Department in Washington in support of the Strike Force's request for permission to secure Indictment 85-CR-354. (A:157-58) In the course of preparing this memorandum, Alan Friedman "had the initial responsibility of extracting from the minutes those portions that the government was going to be able to specifically prove were false and also portions of the minutes that would evidence his obstructive behavior, if you will, false evasive, misleading testimony." (A:158) When Mr. Friedman finished this job, he showed Ms. Brevetti "the excerpts that he ... recommended that we include in the prosecutive memorandum for our superiors...." (*Id.*) Ms. Brevetti testified that she did not read any other portions of Mariani's grand jury minutes prior to preparing the prosecutive memorandum for Indictment 85-CR-354. (*Id.*)

Subsequently, a shorter prosecutive memorandum was sent to the Justice Department in connection with proposed indictment 86-CR-015. Ms. Brevetti testified that she did not rely on Mariani's immunized testimony in preparing that memorandum. (A:160-61) Nor was Mariani's testimony used to fill in "any gaps or holes that were present in the prosecution case". (A:162) Finally, Ms. Brevetti testified that if Mariani had not testified in August of 1984, or if he had testified without being granted immunity, he "absolutely" would still have been indicted for substantive offenses. (A:165) (Emphasis supplied)

Cross-examination of Ms. Brevetti, however, revealed that the matter was considerably more complicated than her testimony had suggested. From July of 1982, when Giliberti began cooperating with the government, through the time of Mariani's grand jury testimony in August of 1984, no charges had been brought against anyone on the basis of Giliberti's testimony. (A:166) Hence, as Ms. Brevetti admitted, part of her reason for compelling Mariani to testify under a grant of immunity was to corroborate information that had been provided by Giliberti. (A:166-67; 169) This corroboration was important because, as Ms. Brevetti admitted, Giliberti had "credibility problems" which would have made it difficult to prosecute anyone based upon his uncorroborated testimony. (A:167-68)

And, indeed, Ms. Brevetti admitted that Mariani's immunized testimony did corroborate significant portions of Giliberti's information. Specifically, Ms. Brevetti admitted that Mariani had offered corroboration on the following points:

1. That Guardian and Washington did commercial moves and government jobs.[3]

2. That Mariani used non-union help whenever he "could get away with it." (A:176) In fact, Mariani testified in the grand jury that he "didn't

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[3] Ms. Brevetti testified that she had first learned this information from Mariani when he testified before the grand jury without immunity. (A:176) However, a review of the transcript of Mariani's September 12, 1983 grand jury testimony (A:385-414) shows that he did not provide any such information about the nature of Guardian's or Washington's business.

abide by any particular set of regulations or rules." (A:298)

3. That Mariani had admitted that some of his jobs had been stopped by the union. (A:178)

4. That Mariani purchased union books to cover up the fact that he was hiring non-union employees. (A:179-80)

5. That Mariani knew Jimmy Rotondo. (A:183)

6. That when Washington Moving and Storage discontinued business, it had an outstanding debt to Local 814 which resulted in a lawsuit. (A:190-92)

Apart from the fact that Mariani's testimony demonstrated to Ms. Brevetti that Giliberti in fact had given her truthful information, the corroboration offered by Mariani was also very significant in light of Ms. Brevetti's admission that "part of my consideration" in determining whether to indict an individual is "the possible testimony or evidence to be presented by the defense". (A:183) Nonetheless, in response to questioning by the trial court, Ms. Brevetti relied upon some tortured logic to extricate herself from the inexorable conclusion that flowed from this admission:

> THE COURT: Was it not significant to you that when you heard this gentleman say to you that he in fact did know a Jimmy Rotondo?
>
> * * *
>
> THE WITNESS: It was significant to me in August [of 1984].... And until he denied making payoffs, and then its significance evaporated to me.

(A:196-98)

Mariani's alleged relationship with Rotondo was perhaps the single most important issue in the RICO case, as the trial court relied upon this relationship in denying Mariani's Rule 29 claim that the government had failed to prove that Mariani had sufficient knowledge of the overall scope, including the involvement of organized crime, of the charged RICO enterprise. (T:9252) Yet, Ms. Brevetti claimed that Mariani's truthful admission that he knew Rotondo had no importance in light of his denial of making payoffs to Rotondo. To say the least, this claim is somewhat surprising in view of the facts (1) that Mariani could not have been making payments to Rotondo unless he knew him, and (2) that the government had no surveillance photographs of Mariani and Rotondo together. (A:198) Apart from Mariani's admission that he knew Rotondo, then, the only evidence of a relationship between the two came from Giliberti.

Finally, cross-examination of Ms. Brevetti focused on the two prosecutive memos that were sent to the Justice Department in Washington. Ms. Brevetti testified that both memos were reviewed by Edward McDonald, Chief of the Organized Crime Strike Force in Brooklyn, and Paul Coffey[4], Ms. Brevetti's superior in Washington, D.C. Without Mr. Coffey's approval, a prosecution may not proceed. (A:202-03) Significantly, the first prosecutive memo, which dealt with the plan to indict Mariani on perjury and obstruction of justice charges, included truthful portions of Mariani's immunized testimony. It also included, for context, portions of the grand jury testimony in which Mariani admitted knowing co-

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[4] In fact, the second prosecutive memo was addressed to a David Margolis. (A:361)

defendants James Brocco and Charles Martelli, and which made clear that Mariani had admitted knowing Rotondo. (*See* A:158-59) Ms. Brevetti testified that, although she "seriously doubt[ed] it", *she did not know whether her superiors had relied on this truthful immunized testimony in approving Mariani's RICO indictment.* (A:206) The government, however, did not call McDonald, Coffey, or Margolis as witnesses.

B. Alan Friedman's Testimony

Having, "in a general way", discussed "the direction that this [*Kastigar*] hearing was taking" with his colleagues (A:242), Alan Friedman mainly attempted to answer the questions that had been raised by Ms. Brevetti's testimony. Mr. Friedman testified that, in preparing the prosecutive memo on the perjury and obstruction charges, he discussed only the perjury specifications and the portions needed for context with Ms. Brevetti. (A:229) He further testified that he had not used the immunized testimony in making any investigative or prosecutive decisions. (A:230) Mr. Friedman stated: "[T]here was just to me no possibility that Mr. Mariani would be a witness for the government at trial and no possibility that anything he said in these minutes would provide any useful leads or evidence against him if he were to become a defendant at trial." (A:231)

Mr. Friedman then sought to ameliorate the effect of Ms. Brevetti's admissions that the truthful parts of Mariani's testimony had served to corroborate the information previously provided by Anthony Giliberti. According to Mr. Friedman, he did not believe that Mariani corroborated Giliberti because "to me corroboration is tied up with the concept of utility". (A:232) In other words, Mr. Friedman "had no doubts about Mr. Giliberti's veracity.... There were no personal doubts about him to assuage." (*Id.*) According to Mr.

Friedman, Mariani merely repeated what he [Mr. Friedman] already knew.

Nonetheless, on cross-examination, Mr. Friedman admitted that he was speaking of corroboration only in terms of his personal view of Giliberti. As a matter of strategy, *he conceded that he would not have made a case against Mariani "for perjury, obstruction, substantive offenses or anything else on the [uncorroborated] word of Anthony Giliberti"*. (A:235) (Emphasis supplied) Mr. Friedman also admitted that the purpose of immunizing Mariani was to obtain testimony that would corroborate Giliberti. (A:238) And, in fact, *part of Mariani's immunized testimony was "[n]ot only completely truthful, ... but completely relevant to the matter ... under investigation"*. (A:239) (Emphasis supplied)

Following this admission, Mr. Friedman testified that the truthful portion of Mariani's testimony had been irrelevant to him because "as [Mariani] made his false denials, I knew that none of that would ever be of any use to me and, therefore, I wouldn't call it confirming anything for me." (A:243) Yet, as the trial court found (A:428), this claim was suspect given Mr. Friedman's admission that part of the reason that codefendants Philip Goldstein and Frank Muli were not indicted on RICO charges in this case was Mr. Friedman's belief that they were not "connected to any organized crime at all." (A:250) Thus, Mr. Friedman's denials to the contrary, the fact that Mariani admitted knowing Jimmy Rotondo was extraordinarily significant to him.

In addition, *Mr. Friedman in essence admitted that he had made strategic use of Mariani's immunized testimony.* Mr. Friedman testified that based upon his impression of Mariani as "a very volatile man" (A:255), he took what the trial court viewed as the "extraordinary [step] of not wasting any time preparing for cross-examination [of Mariani]". (A:256) The trial court stated:

> You ruled that out like we do when we conduct ordinary discovery in civil cases. You said, "Well, I found out what kind of guy he is. I don't have to worry about his testifying in that area because I know him to be the kind of person who shoots his mouth off in such an unpredictable way that he will never take the stand and cross-examination," isn't that the kind of use that is made of depositions in civil litigation?

(*Id.*)

Mr. Friedman then attempted to escape the consequences of this testimony by claiming that his view of Mariani had been primarily based upon reading the minutes of Mariani's non-immunized September, 1983 grand jury appearance. (A:257) Beyond the fact that Mr. Friedman conceded that part of his reason for not preparing cross-examination was based upon his visual impression of Mariani in the grand jury (A:256), any claim of reliance upon the September, 1983 testimony is belied by the government's actions after the date. That is, if the transcript of Mariani's initial appearance before the grand jury revealed that he had made a terrible impression, the government surely would not have then sought to immunize him for the purpose of using him as a government witness.

THE DISTRICT COURT'S OPINION

In dismissing Indictment 86-CR-015, the trial court offered a number of reasons for its decision. *First*, he found Mariani's admission that he knew Jimmy Rotondo to be very significant because it provided a key link between Mariani and the alleged organized crime figures charged in the indictment. (23a-24a) *Second*, Mariani's testimony also corroborated other parts of the government's case relating to the union's non-enforcement

of collective bargaining agreements. (24a-26a) *Third*, apart from the corroboration value of Mariani's testimony, the trial court found that it also had served notice upon the government that the defense's options were limited:

> Once Mariani made admissions material to the government's case against him, the government assured itself that Mariani could not testify at trial to the contrary, e.g., that he did not know Jimmy Rotundo. In this sense, the immunized testimony assisted the prosecutors in much the way pretrial discovery does in any litigation. The prosecutors knew that defendant could not deny at trial a key part of the government's evidence without risking another perjury prosecution.

(24a)

In sum, then, a number of reasons, most of them involving credibility determinations by the trial court, were given for the dismissal of the indictment. We contend here that all of them are valid, although just one of them would be sufficient to sustain the trial court's order.

THE COURT OF APPEALS' REVERSAL

In reversing the District Court's ruling, the Second Circuit did not substantially dispute the trial court's factual findings about these non-evidentiary uses. Nor should it have in light of the rule that such factual determinations may not be overturned unless they are "clearly erroneous." *See United States v. Coonan*, 826 F.2d 1180, 1186 (2d Cir. 1987). Rather, the Court rejected the view that *Kastigar* bars non-evidentiary uses of immunized testimony:

> To the extent that *McDaniel*[5] can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's throught processes in preparing the indictment and preparing for trial, we decline to follow that reasoning.

United States v. Mariani, supra, at 11a.

We contend in this petition that the Court's decision was both an overly-narrow interpretation of *Kastigar* and in conflict with the decision of the other Circuit Courts of Appeals.[6]

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[5] The Court was referring to *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), a case where the Eighth Circuit held that *Kastigar* does bar the types of uses of immunized testimony that the trial court found in this case.

[6] The Court of Appeals apparently recognized the significance of its ruling by granting petitioner's application to stay the mandate until this Court rules on his petition.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER *KASTIGAR* BARS THE NON-EVIDENTIARY USES OF IMMUNIZED TESTIMONY.

In the end, there is but one issue for this Court to decide: Was the Court of Appeals correct in its contention that the requirements of §6002 and *Kastigar* are fully met so long as the government can establish an independent source for all of its evidence? In other words, does *Kastigar* prohibit the government from making indirect, or strategic, use of immunized testimony? If *Kastigar* entails more than this simplistic inquiry into the geneology of the government's evidence, the Court of Appeals should be reversed.

The Court of Appeals concluded that *Kastigar* requires only that the government demonstrate that it has not used a defendant's compelled testimony or its derivative evidence *as evidence*, and that the defendant's conviction was based upon evidence at trial from independent sources. One simple hypothetical demonstrates that this view of the law is wrong, and why all the other Circuit Courts have reached a contrary conclusion. On the Second Circuit's view of *Kastigar*, a prosecutor could build an independent case against a person and then, just prior to indictment, immunize the target for the purpose of estimating whether he would testify in his behalf, how attractive a witness he would be, or what story he would tell. In other words, the government could routinely enjoy a prospective criminal defendant's deposition before indictment. If the prosecutor then tried the case using only the evidence he had prior to immunizing the defendant, no *Kastigar* violation would result.

Surely, this cannot be correct. For although the prosecutor's evidence in such a case would be independent, his conduct of trial might well have differed in the absence of the immunized testimony. For example, he might have concluded that the defendant's demeanor as a witness was so unattractive that it would be unlikely that the defendant would testify. He might also, having heard the defendant's account of what had occurred, be more confident about some of his evidence because the defendant had corroborated it.

No one could fairly argue that this type of prosecutorial behaviour is consistent with the spirit and substance of *Kastigar*. Yet, the Second Circuit's view of §6002 permits just such behaviour. The prosecutors in this case, albeit acting in good faith and not after their investigation was complete, took the precise actions described in the above hypothetical. That is, they used Mariani's immunized testimony both to corroborate accomplice witnesses who had extraordinary credibility problems, and to plan trial strategy by assuming that Mariani would not testify.

In *Pillsbury Company v. Conboy*, 459 U.S. 248 (1983), this Court made clear that the government has the "heavy burden", *Kastigar v. United States*, *supra*, of demonstrating that "'the witness and the Federal Government [are] in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity.'" 459 U.S. at 255 (Citations omitted). Surely, this test is not met where the government makes non-evidentiary use of immunized testimony, including use of the testimony for trial strategy and for corroboration of other witnesses.

As the Court stated in *United States v. Henderson*, 406 F.Supp. 417, 428, n.19 (D.Del. 1975):

> [T]here is probably no prosecutor who would not consider it a substantial benefit to be able to take the pre-trial deposition of a criminal defendant. Allowing similar use to be made of compelled testimony is, accordingly, hard to square with the Court's statements [in *Kastigar*] that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," and "assur[es] that the compelled testimony can in no way lead to the infliction of criminal penalties." *Id.*, at 453, 461, 92 S.Ct. at 1661, 1665 (Emphasis in original)....

No Circuit Court has ever held, as the Second Circuit held, that *Kastigar* prohibits only the use of *evidence* derived from immunized testimony. To the contrary, all Circuits addressing this issue have agreed that so-called "non-evidentiary" uses are also barred. The seminal case on the non-evidentiary use of immunized testimony is *United States v. McDaniel, supra.* In *McDaniel*, the government's trial counsel read three volumes of McDaniel's North Dakota State grand jury testimony while unaware that, under North Dakota law, a grand jury witness is automatically granted immunity when he testifies. Rejecting the government's claim that it needed only to show an independent source for the evidence introduced at McDaniel's trial, the Court affirmed the lower court's dismissal of McDaniel's indictment, stating:

> We find, however, that even though the voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence adduced at McDaniel's trial, such reports nevertheless fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictments, did not use it in some significant way short of introducing tainted evidence.... *Such use could*

> *conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.*

482 F.2d at 311 (Emphasis supplied); *see United States v. First Western State Bank of Minot, N.D.*, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

McDaniel was followed by *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983). In *Semkiw*, the Court quoted the above section from *McDaniel* in ruling that the government had an obligation to show that it did not make non-evidentiary use of the defendant's prior immunized testimony. Similarly, in *United States v. Dornau*, 359 F.Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974), a case which also involved a trial prosecutor who read a transcript of the defendant's immunized testimony, the Court relied upon *McDaniel* and stated:

> We have here one of the problems presented by the opinion in *Kastigar*. How do you make sure that a person who has testified under a grant of immunity will be protected against subsequent criminal charges to the same extent as if he had originally pleaded the Fifth Amendment? ... It is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the Assistant charged with the prosecution of the case.

359 F.Supp. at 687 (Emphasis in original).

More recently, two other Circuits have noted their accord with *McDaniel* and its progeny. In *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985), the Court

rejected *McDaniel* only to the extent that it rejected the defendant's claim that his immunized testimony had played a part in the prosecutor's motive for seeking an indictment against him. However, the Court also cited *McDaniel* and *Semkiw* with approval when it noted that *Kastigar* bars the prosecution from "deriv[ing] some benefit in the preparation of the case by virtue of ... the immunized testimony." 765 F.2d at 1531-32.[7]

In *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987), the Court also agreed with *McDaniel*'s view of *Kastigar*, and rejected the defendant's immunity claim only because "the record is silent as to the prosecution's ... use of the immunized testimony for other non-evidentiary purposes such as planning cross-examination, interpreting evidence, and otherwise generally planning trial strategy." 828 F.2d at 1431. Here, of course, the record is not silent. Government attorney Alan Friedman admitted that Mariani's immunized testimony caused him not to prepare for cross-examination. Similarly, the trial court found that the government made significant corroborative use of Mariani's testimony. On these facts, the *Crowson* Court would have ruled in the defendant's favor. *See United States v. Carpenter*, 611 F.Supp. 768, 780 (N.D.Ga. 1985) ("Further, the government has not established that the information given by Carpenter under promises of immunity has not been used by the government to confirm the truthfulness of what was being

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[7] Significantly, the government in *Byrd* took precisely the steps that should have been taken here. That is, a separate prosecutor was appointed to present the case against Byrd to a grand jury other than the one that had heard his immunized testimony. The defendant's complaint in *Byrd* was thus far more speculative: that the prosecutor who had questioned him in the grand jury participated in the decision to seek an indictment.

told to them by cooperating witnesses."); *see also United States v. Tormos-Vega*, 656 F.Supp. 1525, 1531 (D.P.R. 1987).

In our view, the reasoning found in these decisions is compelling. At present, the Second Circuit stands alone in its limited view of *Kastigar*. The significance of the issue presented here is obvious. Given this clear split among the Circuits, the matter should be resolved by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212)486-1717

On The Petition
JUDD BURSTEIN
757 Third Avenue
New York, New York 10017
(212)826-1200

APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 571 — August Term, 1987

(Argued: January 19, 1988 Decided: July 11, 1988)

Docket No. 87-1394

UNITED STATES OF AMERICA,

Appellant,

-against-

DOMINIC MARIANI,

Appellee.

Before:

LUMBARD, KEARSE, and PIERCE, *Circuit Judges*.

Appeal from an order of the Eastern District of New York, Sifton, *Judge*, which vacated appellee Dominic Mariani's conviction for RICO conspiracy and other charges on the ground that the government had made impermissible, non-evidentiary uses of immunized testimony given by Mariani before a grand jury.

Reversed; convictions reinstated.

FRANK J. MARINE, Attorney, U.S. Department of Justice, Washington, D.C. (Andrew J. Maloney, United States Attorney for the Eastern District of New York; Edward A. McDonald, Attorney-in-Charge, U.S. Department of Justice, Organized Crime Strike Force, Eastern District of New York; Mario Dinatale, Laura A. Brevetti, Alan M. Friedman, Special Attorneys, U.S. Department of Justice, Brooklyn, New York, of counsel), for appellant.

Appendix A
Opinion of the United States Court of Appeals

JUDD BURSTEIN, New York, N.Y. (Gerald L. Shargel, New York, N.Y., of counsel), for appellee.

LUMBARD, *Circuit Judge:*

The government appeals from an order of Judge Sifton of the Eastern District of New York which vacated Dominic Mariani's conviction for conspiring to participate in the affairs of an enterprise through a pattern of racketeering (18 U.S.C. § 1962(d)), conspiring to commit extortion (18 U.S.C. § 1951), making illegal payments to a union representative (29 U.S.C. § 186(a)(2)), and making illegal payments to influence the operation of an employee benefit plan (18 U.S.C. § 1954). The court dismissed the indictment against Mariani on the ground that the government improperly used testimony Mariani had given to a grand jury under a grant of immunity in order to obtain his conviction. Finding that Mariani's indictment and conviction were based on evidence wholly independent of his immunized testimony, we reverse the order of the district court and reinstate Mariani's conviction and sentence.

The record shows that the government made no use of Mariani's immunized testimony in presenting its case at Mariani's trial. Nor did the government make any impermissible non-evidentiary use of Mariani's immunized testimony. Our conclusion and reasons therefor require us to set forth at some length the steps in the government's investigation of Teamsters Local 814 which began in 1982.

I.

After a lengthy investigation by the government, the grand jury returned Indictment 85-CR-00354 (the "1985 Indictment") on June 10, 1985 charging Philip Rastelli and 16 others with participation in a RICO conspiracy consisting of various trucking companies and members of organized crime to corrupt Teamsters

Union Local 814.[1] Although not then indicted on the conspiracy charges, Mariani was charged in counts 54 and 55 of this indictment with making false material declarations before the grand jury on August 23, 1984, and with obstruction of justice (in violation of 18 U.S.C. §§ 1623(a), 1503). Those charges were based on Mariani's allegedly false testimony in regard to his role as a co-conspirator as the owner of Washington Moving and Storage Company and later as a principal of Guardian Worldwide Transport, as well as his status as a beneficiary of the conspiracy resulting from his participation in bid-rigging of government moving contracts, unlawful payments with respect to employee benefit funds and various Taft-Hartley law violations. The conviction of Mariani on counts 54 and 55 of this 1985 indictment is not at issue in this appeal, but the investigation leading to that 1985 Indictment is relevant to our inquiry concerning the basis for his later indictment for RICO conspiracy and other charges.[2]

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[1] Defendants Philip Rastelli, Nicholas Marangello, Joseph Massino, Carmine Rastelli, James Bracco, Charles Martelli, Charles Agar, Anthony Cantatore, Frank Muli and Warren Weissman were convicted of charges made in the 1985 Indictment. All have filed notices of appeal in this court but Muli has withdrawn his appeal. *United States v. Rastelli, et al.*, C.A. Nos. 87-1057/1065, 87-1097/98. Defendant John Scordato died prior to trial. A mistrial was declared with respect to defendant Joseph Schwartz because of illness and his case was severed. Defendant Anthony Ficarotta pleaded guilty to count 1. John Konovitch pleaded guilty to count 56. Charles Rosenberg pleaded guilty to count 58. Philip Goldstein was acquitted on all counts.

[2] Mariani's appeal from his conviction on the false statement and obstruction charges made by the 1985 Indictment is pending along with the appeal of Mariani's co-defendants who were convicted at trial with Mariani. *United States v. Rastelli, et al.*, C.A. Nos. 87-1057/1065, 87-1097/98.

Appendix A
Opinion of the United States Court of Appeals

In January 1986, as a result of additional evidence developed by the government, Mariani was charged in Indictment 86-CR-0015 (the "1986 Indictment") with four offenses, including the RICO conspiracy already charged against Rastelli and his co-defendants in the 1985 Indictment.

After the district court consolidated the two indictments for trial, Mariani petitioned the court to conduct a hearing, pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), to determine whether the proceedings leading to, and the trial based upon, the 1986 Indictment were or would be tainted by his prior immunized testimony. On February 21, 1986, the district court ruled that such a hearing would be conducted after the trial.

Following a six-month trial of Mariani and his co-defendants charged in the 1985 Indictment, Mariani was convicted by a jury of the four counts charged in the 1986 Indictment and the false statement and obstruction of justice charges made in the 1985 Indictment. On February 10, 1987, the district court sentenced Mariani to a total of one year imprisonment on the false statement and obstruction charges, to be served consecutively with four one year consecutive terms on the four counts of the racketeering conspiracy. He was also fined $15,000 and ordered to forfeit $5,000 to the United States.

At the *Kastigar* hearing, held on July 9, and 14, 1987, the government called Laura Brevetti, Assistant Attorney-in-Charge of the Brooklyn Strike Force, Alan Friedman, Special Attorney with the Strike Force, and Special Agent David Stone of the FBI, all of whom were involved in the investigation of the conspiracy at issue in this appeal. The court received transcripts of Mariani's non-immunized grand jury testimony of September 12, 1983, his immunized grand jury testimony of August 23, 1984, portions of the government's prosecutive memorandum dated July 9, 1985, and subpoenas dated June 11, May 2, and August 27, 1985 calling for the production of documents from Mariani's moving companies. The court also heard evidence concerning the roles of two

government witnesses, Anthony Giliberti and Warren Wagner, in the government's investigation of Mariani's role in the RICO conspiracy.

Mariani's Grand Jury Testimony on September 12, 1983

Mariani was first called before the grand jury on September 12, 1983. He testified, without claiming immunity, that he was an employee of Guardian Worldwide Movers, a company owned by his son, since 1981. He previously had been a part owner and employee of Washington Movers since 1952, which was no longer in business. Washington Movers' employees were represented by Local 814 and Mariani was a member of Local 814. Washington Movers had non-union as well as union employees. Mariani testified that he knew Anthony Giliberti, Local 814's delegate for Washington Movers, and Earl Coralluzo, Local 814's business agent. He had "no such recollection" whether he paid Coralluzo for preferential treatment from Local 814.

Mariani, asserting his privilege against self-incrimination, refused to answer various questions, including the following: whether he knew an organized crime figure named Jimmy Rotondo, whether Washington Movers paid five percent of certain contracts to Local 814, whether he was responsible for $1,000 a month being paid to Local 814 from Guardian Movers, whether he gave money to Anthony Cantatore or Jimmy Rotondo, and whether Washington Movers bought approximately forty Local 814 union membership books for $4,000.

Mariani's Grand Jury Testimony on August 23, 1984

On August 23, 1984, Mariani testified again before the same grand jury pursuant to a grant of immunity under 18 U.S.C. § 6002. He testified that he was part owner and president of Guardian Transport Company, Inc./Worldwide Moving. Previously, Mariani worked for his father's company, Washington Moving and Storage Company which was in existence from 1915 to 1981. Both companies' employees were represented by Local

814. Mariani's companies used non-union labor, were delinqent in paying their obligations to Local 814's Welfare and Pension Funds, and were not subjected to a strike by Local 814 that affected the other moving companies.

Mariani also testified that he had known Anthony Giliberti and Earl Coralluzo since the early 1970's and that they were business agents for Local 814. He knew Jimmy Rotondo, James Bracco, president of Local 814, and Charles Martelli, secretary-treasurer of Local 814. Mariani testified that he never discussed with Giliberti, Coralluzo, Bracco, Martelli, or Rotondo or anyone else making payments to them or to other representatives of Local 814, and he never made payoffs to them or to any other official of Local 814, or anyone else in order to do business or for benefits. Mariani added that he had no personal knowledge of anyone making payoffs to Local 814 on behalf of Washington Movers or Guardian Movers. He testified that he never negotiated a payment and never made a payment to Local 814 representatives to reduce the debt of his companies to Local 814's Pension and Welfare Funds.

Giliberti's Testimony

The *Kastigar* hearing showed that, in July 1982, Anthony Giliberti, at trial a key witness against Mariani and his co-defendants, entered into the Witness Protection Program. Giliberti became an organizer for Local 814 in 1970 and its vice-president in 1979. He disclosed a longstanding criminal enterprise composed of officials of Local 814 of the Teamsters Union and of its pension and welfare funds, representatives of organized crime, and executives in the moving and storage industry. Prior to Mariani's first appearance before the grand jury, Giliberti told prosecutors that Mariani owned or operated Washington Moving & Storage and Guardian Worldwide Movers, which performed commercial and government moving contracts. He also said that Mariani agreed to make payoffs to officials of Local 814 amounting to five percent of the gross receipts of contracts made

by his companies to Jimmy Rotondo. As a consequence of this payoff scheme, Giliberti said that Mariani was permitted to use non-union labor and to remain delinquent in his payments to the union pension and welfare funds. Finally, he told the government that Rotondo interceded with the union on Mariani's behalf during 1974. Although Giliberti was not aware of either the precise nature or the purpose of the payoffs or of this five percent scheme, the government later learned the details of both from Warren Wagner in mid-December 1984.

Wagner's Testimony

Warren Wagner first became available to the Brooklyn Organized Crime Strike Force in December 1984, through the United States Attorney for the Southern District, after pleading guilty to federal tax violations in the Southern District.

Wagner was the president of Wagner Moving & Storage, a large New York City commercial mover. Wagner Moving was a family owned business of which Wagner became chief executive late in 1974. By 1978, approximately ninety percent of the firm's business involved federal, state and local agencies. Wagner Moving's major competitors were Mariani's two moving companies and two other firms (Deluxe Van Lines and Schwartz Moving and Trucking) which were referred to in the 1985 Indictment. Wagner told the government that periodically between 1970 and 1978, he and Mariani joined with officers of the two other firms in bid-rigging combinations that were the forerunners to the 1978-82 "five percent club" conspiracy described in the 1986 Indictment.

Giliberti's evidence first indicated Mariani's involvement in the conspiracy. It was Wagner's disclosures, in December 1984, however, which greatly strengthened the government's case by supplying the details of Mariani's involvement in the bid-rigging and payoff schemes. With the evidence by Wagner, Brevetti and Friedman decided to press racketeering charges against Mariani. In July 1985, the Attorney General authorized

the government prosecutors to present evidence to a new grand jury of Mariani's participation in the substantive crimes already charged against Rastelli and his co-defendants. In January 1986, that grand jury indicted Mariani for participation in the same racketeering conspiracy.

The District Court's Findings

On August 8, 1987, based upon the *Kastigar* hearing, Judge Sifton found that the government had impermissibly used Mariani's immunized testimony. The court vacated Mariani's conviction and dismissed the 1986 Indictment against him. The court did not disturb Mariani's conviction for making false statements to the grand jury and obstruction of justice charged in the 1985 Indictment.

According to the district court, 18 U.S.C. § 6002 was "designed to leave the witness who is compelled to testify in substantially the same position as if the witness had not testified" and remained silent, and accordingly, "places a 'total prohibition' on the use of immunized testimony against a witness" in *"any respect"*. (Emphasis in district court opinion.) Thus, the court ruled that 18 U.S.C. § 6002 proscribes non-evidentiary uses of immunized testimony. *See generally Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983); *Kastigar*, 406 U.S. at 453, 462.

The district court found that the prosecutors had impermissibly used Mariani's immunized testimony in three non-evidentiary respects. First, Mariani's immunized admissions that he knew Jimmy Rotondo, and that Mariani's companies used non-union labor, underpaid their obligations to the Welfare and Pension Funds and had never been the subject of a strike, corroborated the testimony of government witnesses Giliberti and Wagner about these matters.

Second, Mariani's relationship with Rotondo, an organized crime figure, was an important factor indicating that "Mariani had knowledge of the RICO enterprise's scope and organized crime component." In that

regard, the court found that even if Mariani's immunized testimony about his knowing Rotondo did not induce the prosecutors to obtain an indictment on RICO charges against Mariani, "the government's use of confirmatory information nevertheless violates the use immunity statute."

Finally, the district court concluded that "Friedman . . . made no effort to prepare to cross-examine Mariani because he believed, from examining the minutes of Mariani's grand jury testimony that Mariani would not testify in his own defense." The court also noted that the government knew that, having admitted before the grand jury during his immunized testimony that he knew Rotondo, Mariani would not testify at trial.

II.

The evidence given by Giliberti (which became available to the government before Mariani gave his immunized testimony to the grand jury on August 23, 1984) and Wagner was quite sufficient to indict Mariani and convict him of racketeering conspiracy.

The statute under which Mariani was directed to testify, 18 U.S.C. § 6002, clearly prohibits evidentiary direct or indirect use of the witness's testimony. *See Kastigar v. United States*, 406 U.S. at 453. Title 18 U.S.C. § 6002 provides in pertinent part:

> [N]o testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The statute does not provide that a witness may never be prosecuted for any illegal participation in the matters about which he gives testimony. It is well established that such a witness may be prosecuted for such illegal acts if the prosecution is based solely on evidence

obtained from independent sources. *Kastigar*, 406 U.S. at 460-61.

Where a witness is later prosecuted for an offense which was the subject of his testimony given under immunity, it is recognized that the government bears a heavy burden to show that the evidence it uses in the subsequent prosecution was not derived directly or indirectly from the witness's immunized testimony. To sustain this burden, we have held that the government must prove that it "relied solely on evidence from legitimate independent sources." *In re Corrugated Container Antitrust Litigation*, 644 F.2d 70, 76 (2d Cir. 1981) (citing *Kastigar v. United States*, 406 U.S. at 460); *see United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

In *Catalano*, the defendants were found guilty of conspiring to evade income taxes and one of the defendants was found guilty of evading income taxes and filing a false return. Prior to his indictment, one defendant had appeared before a county grand jury under a grant of immunity regarding events relating to the matters with which he was charged. Finding that the government had met its burden of demonstrating that it had information related to the charges it ultimately brought against the defendant prior to the indictment and that the evidence introduced at trial was derived from sources independent of the defendant's immunized testimony, we held that the district court had properly denied the defendant's motion to dismiss the indictment against him. *Catalano*, 491 F.2d 272.

> [T]he prosecutor here established that he had prior knowledge of substantially all the information covered in the [defendant's] testimony, thus foreclosing the possibility that he made "any use, direct or indirect, of the compelled testimony and any information derived therefrom [in violation of 18 U.S.C. § 6002]".

Id. (quoting *Kastigar vs. United States*, 406 U.S. at 460); *see also United States v. Bianco*, 534 F.2d 501, 510-11 & n.14 (2d Cir.) (the government was not barred from prosecuting defendant because it was able to demonstrate that it already knew everything relevant to its case prior to the defendant's immunized testimony before a state grand jury), *cert. denied*, 429 U.S. 822 (1976). *Cf. United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *United States v. Semkiw*, 712 F.2d 891, 894-95 (3rd Cir. 1983).

In *McDaniel*, the government's trial counsel read three volumes of testimony given by McDaniel to a state grand jury. The counsel was unaware that under North Dakota law, a grand jury witness is automatically granted immunity when he testifies. The court found that the government failed to meet its burden of demonstrating an independent source of the evidence adduced at the defendant's trial. The court reasoned that the government did not adequately show that the prosecutor had not used the immunized testimony "in some significant way short of introducing tainted evidence." *McDaniel*, 482 F.2d at 311. The court went further and suggested possible ways in which the Assistant United States Attorney may have used the testimony impermissibly:

> Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

Id.

To the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning.

The government has proven that the evidence used at Mariani's trial was derived from sources entirely independent of any immunized testimony given by Mariani. Not only was no direct use made of the immunized testimony; no indirect use was made of that testimony. Anthony Giliberti's testimony about Mariani's participation in the conspiracy was given to the government in July 1982. Warren Wagner became a government witness in December, 1984, only after he had pleaded guilty to a tax fraud charge in the Southern District. Mariani's immunized testimony given in August 1984 had made no mention of Wagner.

In view of the government's convincing proof that the evidence upon which it based its prosecution of Mariani came from legitimate independent sources, we cannot see how the government prosecutors' knowledge of Mariani's immunized testimony could be considered impermissible use of that testimony.

The district court made three specific findings of impermissible non-evidentiary use of Mariani's immunized testimony by the government. We believe the record establishes that these findings were either unjustified or that the "uses" at issue were wholly conjectural and insubstantial.

First, the district court found that Mariani's admissions that he knew Rotondo, that his companies used non-union labor and underpaid fund obligations, corroborated the testimony of Giliberti and Wagner. The short answer is that the government simply did not use Mariani's admissions; nor did it have any need to do so. Giliberti's and Wagner's testimony showed Mariani's dealings with Rotondo and formed more than a sufficient basis for the prosecutors to have brought the 1986 Indictment against Mariani, and for the jury to convict.

Second, the district court found that Mariani's immunized testimony about his relationship with Rotondo was an indication of Mariani's knowledge of the workings of the conspiracy. Here again, the trial evidence of this

came not from Mariani's testimony but from Giliberti and Wagner. Mariani's admissions were in no sense used to corroborate Giliberti and Wagner. Their testimony needed no corroboration by Mariani to justify the government's prosecution.

Finally, the district court held that knowledge of Mariani's immunized testimony was an impermissible use because the prosecutor made no effort to prepare to cross-examine Mariani because he knew from Mariani's immunized testimony that it was unlikely that Mariani would take the stand. We do not see how the prosecutor's judgment that Mariani would not take the stand can be considered a use of the immunized testimony. The failure to prepare any cross-examination of Mariani could not have strengthened the government's case. Mariani himself, by his false testimony at his first appearance before the grand jury, had created the situation which made it virtually certain that he would not take the stand.

Were these supposed non-evidentiary uses of Mariani's immunized testimony found to be so impermissible that they barred prosecution thereafter for the matters covered by the witness, it would be impossible ever to prosecute a witness for such matters, once the witness has given immunized testimony. The statute and the case law demonstrate that it was not the intention of Congress, nor is it the command of the Constitution, to give any witness such broad and complete immunity.

Mariani has not been unfairly or improperly treated by being subjected to prosecution for his part in the conspiracy. His dilemma and convictions are the result of his choosing to deny, under oath, any knowledge or any part in the conspiracy. Instead of invoking the Fifth Amendment and refusing to answer certain questions, or telling the truth when sworn before the grand jury, he elected to deceive and obstruct. He thus ran the risk that others would tell the story and implicate him. Giliberti and Wagner did tell the story of Mariani's involvement

in the conspiracy. The government was not barred from using their testimony. The conviction based on their testimony should stand.

Reversed and remanded for reinstatement of the convictions and the sentence.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of September, one thousand nine hundred and eighty-eight.

FILED: September 20, 1988

Docket No. 87-1394

UNITED STATES OF AMERICA,
Appellant,

-v.-

DOMINIC MARIANI,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee DOMINIC MARIANI,

Upon consideration by the panel that heard the appeal, it is

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

Elaine B. Goldsmith
Clerk

Appendix C
Opinion of United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

DOMINIC MARIANI,

Defendant.

CR-86-00015
MEMORANDUM AND ORDER

SIFTON, District Judge

On October 15, 1986, a jury returned a verdict convicting defendant Mariani on charges of perjury and obstruction of justice contained in Indictment CR-85-00354. The jury also convicted defendant Mariani on four counts contained in Indictment CR-86-00015 which had been consolidated for trial with the perjury and obstruction case. Indictment CR-86-00015 charged Mariani with (1) conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), (2) Hobbs Act conspiracy, (3) illegal labor payoffs, and (4) bribery of officials of an employee benefit fund. On February 10, 1987, the Court sentenced defendant Mariani to one year's imprisonment on the perjury and obstruction charges contained in CR-85-00354 and four year's imprisonment on the four counts contained in CR-86-00015 to be served concurrently with each other but consecutively to the sentence on CR-85-00354.

The matter is now before the Court on defendant Mariani's motion to dismiss the charges in Indictment CR-86-00015 on the ground that the government used Mariani's immunized grand jury testimony in connection with the proceedings leading to his conviction on those charges, in violation of 18 U.S.C. § 6002.

Appendix C
Opinion of United States District Court

After the Court consolidated Indictments CR-85-00354 and CR-86-00015 for trial, defendant Mariani requested that the Court conduct a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), to determine whether the proceedings leading to and the trial of Indictment CR-86-00015 were or would be tainted by Mariani's prior immunized testimony. On February 21, 1986, the Court granted Mariani's application to conduct such a hearing but directed that the hearing take place after the trial. After his conviction and sentence Mariani appealed to the Second Circuit Court of Appeals, although the immunity issue had not been resolved.

On July 9 and 14, 1987, after the parties agreed that Mariani would withdraw his appeal without prejudice to its renewal, the Court conducted a *Kastigar* hearing. The government called as witnesses Laura Brevetti, Assistant Attorney-in-Charge of the Brooklyn Strike Force; Alan Friedman, Special Attorney with the Strike Force; and Special Agent David Stone of the FBI. The Court also received in evidence transcripts of defendant's non-immunized grand jury testimony of September 12, 1983, and his immunized grand jury testimony of August 23, 1984; portions of the government's prosecutive memorandum dated July 9, 1985; and various subpoenas duces tecum calling for the production of documents from defendant Mariani's companies, Washington Moving & Storage and Guardian World Wide Movers.

Based upon the testimony and other evidence introduced at the hearing, Mariani's motion for an order dismissing Indictment CR-86-00015 must be granted. The following sets forth the Court's essential findings of fact and conclusions of law on which this determination is based as required by Rule 12 of the Federal Rules of Criminal Procedure.

In July 1982, Anthony Giliberti, a key witness in the government's case against Mariani and his co-defendants, entered into the Witness Protection Program. In various debriefing reports, Giliberti told the government

of a long-standing criminal enterprise comprised of officials of Local 814 of the Teamsters Union and of its pension and welfare funds, representatives of organized crime, and executives in the moving and storage industry. In the course of his debriefing, Giliberti told prosecutors that defendant Mariani owned or operated Washington Moving & Storage and Guardian World Wide Movers, which performed commercial and government moving contracts; that defendant agreed to make payoffs to officials at Local 814 and to an organized crime figure named Jimmy Rotondo; that defendant was, as a consequence, consistently permitted to use non-union labor and to remain delinquent in his payments to the union pension and welfare funds; and that in 1974 Mr. Rotondo interceded with the union on defendant's behalf. Giliberti also admitted his personal participation in these and a host of other illegal activities.

After receiving this information, the government subpoenaed Mariani to testify before a grand jury on September 12, 1983. Special Attorney Douglas Behm of the Department of Justice conducted the inquiry. Mariani, who testified at this time without a grant of immunity, stated among other things that he did indeed employ non-union workers but that this practice did not violate the collective bargaining agreement with Local 814, and that he was indeed delinquent in payments to Local 814's pension and welfare funds. Defendant asserted his fifth amendment privilege with respect to questions as to whether he knew Jimmy Rotondo and whether he made payoffs to Rotondo and officials of Local 814.

In November 1983, Mr. Friedman began working on the case with Mr. Behm; in July 1984, Ms. Brevetti joined the investigation and took over Mr. Behm's responsibilities. Both Mr. Friedman and Ms. Brevetti reviewed Giliberti's debriefing memoranda and his grand jury testimony. In addition, both attorneys read the transcript of Mariani's testimony of September 1983.

After investigating these matters, the prosecutors decided to seek an order compelling defendant to testify before the grand jury in order to obtain another witness who could corroborate Giliberti's testimony. The government attorneys recognized that Giliberti had substantial credibility problems as an accomplice in the crimes he was describing. On July 20, 1984, Judge Glasser, pursuant to the prosecutors' request, issued an order directing defendant to testify before a grand jury pursuant to 18 U.S.C. § 6002.

On August 23, 1984, defendant testified pursuant to that grant of immunity. Ms. Brevetti conducted the inquiry; Mr. Friedman was present in the grand jury room and occasionally suggested questions for Ms. Brevetti to pose to defendant. During his appearance, defendant denied that he had ever made payoffs to officials of Local 814 or to Jimmy Rotondo. This testimony became the subject of the perjury and obstruction of justice counts in Indictment CR-85-00354. Defendant also testified that he used non-union labor whenever he could get away with it, that his companies were Local 814 shops "more . . . in title than we were in reality," that his companies had never been the subject of a strike, and that he knew Jimmy Rotondo. The government accepted these answers as truthful, and they were, of course, relevant to their investigation.

In addition, both Ms. Brevetti and Mr. Friedman were impressed by defendant's manner of testifying before the grand jury. Ms. Brevetti became aware of what she described as defendant's "cavalier attitude" toward Local 814 and its regulations during the immunized testimony. In addition she was struck by defendant's demeanor or attitude before the grand jury which was, in her view, belligerent, evasive, arrogant, and hair-splitting. Mr. Friedman testified that, after listening to defendant's immunized testimony for 5 to 10 minutes, he formed the view that defendant would not be

called as a witness, even if he were a defendant, because of what Mr. Friedman perceived to be his volatility and ill-controlled anger.

Some four months after defendant gave his immunized testimony, the prosecutors obtained the cooperation of Warren Wagner as a witness. During Wagner's debriefing in December 1984, he explained the details of what came to be known as the "5% scheme" involving bid-rigging and collusion among the moving companies operated by Wagner and defendants Weissman, Schwartz, and Mariani and payoffs to union officials and individuals connected to organized crime figures including Rotondo and an Anthony Ficarotta. Mr. Wagner's testimony gave new impetus to the government's case against defendant Mariani. As the prosecutors credibly testified, Giliberti's debriefings and grand jury testimony gave the government "no idea of the scope or breadth of the conspiracy" for which defendant Mariani was eventually charged, nor a "clear understanding of what that scheme was precisely about."

After debriefing Wagner, Ms. Brevetti and Mr. Friedman began preparing a prosecutive memorandum in support of what became Indictment CR-85-00354, which charged defendant Mariani with perjury and obstruction of justice in connection with his immunized grand jury testimony. The government contended that his statements that he had not made payoffs to or discussed payoffs with officials of Local 814 or Jimmy Rotondo were false. A grand jury returned Indictment CR-85-00354 on June 10, 1985.

Indictment CR-85-00354 also charged defendants Weisman, Schwartz, and others but not Mariani with violating RICO, the Hobbs Act, the Taft-Hartley Act, and ERISA. The indictment did not charge defendant Mariani with those substantive offenses because of the prosecutors' recognition that the same grand jury that had heard Mariani's immunized testimony could not, as

a matter of law, consider whether to charge him with the substantive offenses being investigated.

On July 9, 1985, Ms. Brevetti and Mr. Friedman submitted a memorandum to the Justice Department requesting authorization from the Attorney General to present evidence of Mariani's participation in the substantive crimes charged in CR-85-00354 to a new grand jury. In January 1986, a different grand jury returned Indictment CR-86-00015 against defendant Mariani alone after hearing evidence presented by Ms. Brevetti and Mr. Friedman. These indictments were consolidated for trial on January 17, 1986.

In preparing the cases for trial, Mr. Friedman, according to his own account, made no effort to prepare to cross-examine Mariani because he believed, after reading the minutes of defendant Mariani's first grand jury appearance and listening to his immunized testimony, that defendant would not testify in his own defense.

Between April and October 1986, Ms. Brevetti and Mr. Friedman acted as trial attorneys for the government in trial of the two indictments. Their prosecution resulted in the conviction of the defendant on all counts of both indictments.

DISCUSSION

When a witness is compelled to testify pursuant to a grant of use immunity, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 18 U.S.C. § 6002. The use immunity statute is designed to leave the witness who is compelled to testify in substantially the same position as if the witness had not testified and claimed his fifth amendment privilege. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983); *Kastigar v. United States*, *supra*, 406 U.S. at

462. Accordingly, the statute has been broadly construed to "prohibit[ ]the prosecutorial authorities from using the compelled testimony in *any* respect, ... therefore insur[ing] that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453 (emphasis in original). Moreover, the government, not the witness whose testimony was immunized, bears the "heavy burden" of proving that, in prosecuting the witness, the government "relied solely on evidence from legitimate independent sources." *In re Corrugated Container Antitrust Litig.*, 644 F.2d 70, 76 (2d Cir. 1981).

The prosecutors have not borne their burden in this case. Defendant Mariani admitted in his immunized testimony that he knew Jimmy Rotondo, an individual who both Ms. Brevetti and Mr. Friedman believed was involved with organized crime. An admission by an individual that he knows another, in contrast with an admission of underpayment of pension and welfare obligations or even uses of non-union labor, solves difficult problems of proof. The government had no surveillance photographs of Mariani meeting with organized crime figures as it did with other defendants. The testimony of Giliberti as to Mariani's acquaintance with Rotondo needed corroboration because of Giliberti's status as an accomplice witness. Wagner's testimony on this subject, in addition to the infirmities of accomplice testimony, was equivocal at best. The obvious importance of establishing the link to organized crime is illustrated by the prosecutors' decision not to charge two of Mariani's co-defendants, Muli and Goldstein, with RICO offenses, solely because of the lack of evidence of their acquaintance with the organized crime figures involved in the case. Mariani's immunized testimony on this subject corroborated Giliberti's statements that Mariani made payoffs to Rotondo and that in 1974 Rotondo interceded on Mariani's behalf. In addition, it bolstered the government's contention that Rotondo attended the Peter Luger

meeting at which defendant Bracco and the operators of the moving companies agreed to a flat payment of $2,000 per month as the price for continuation of the bid-rigging scheme. The government argued at trial that Mariani's relationship with Rotondo indicated that Mariani had knowledge of the RICO enterprise's scope and organized crime component. Given the significance of Mariani's admission, I am not persuaded by Ms. Brevetti's statement that Mariani's immunized testimony regarding Mr. Rotondo was significant to her only until Mariani denied making payoffs to him. On the contrary, I conclude that the admission was and remained significant to the prosecutors both as corroborating their key witnesses and as otherwise assisting them in the preparation for trial.

Once Mariani made admissions material to the government's case against him, the government assured itself that Mariani could not testify at trial to the contrary, e.g., that he did not know Jimmy Rotondo. In this sense, the immunized testimony assisted the prosecutors in much the same way pretrial discovery does in any litigation. The prosecutors knew that defendant could not deny at trial a key part of the government's evidence without risking another perjury prosecution.

In addition, the prosecutors used Mariani's immunized testimony to corroborate information provided both by Giliberti and Wagner. At the time that Ms. Brevetti and Mr. Friedman questioned Mariani before a grand jury, the only information the government had about bid-rigging, extortion, and labor payoffs on the part of moving companies came from Giliberti. Ms. Brevetti and Mr. Friedman both concede that Giliberti's information was incomplete; indeed, both testified that it was not until they had debriefed Wagner -- which occurred four months after Mariani testified -- that they understood the nature and scope of the defendants' scheme. Moreover, both prosecutors recognized that Giliberti would have

credibility problems with a jury. Thus, in the middle of its investigation, the government sought to compel Mariani to testify with the hope that Mariani would corroborate the information supplied by Giliberti. Mariani testified as to a variety of matters that were central to the government's case which the government had heard at the time from only one other witness. He admitted that he used non-union labor whenever he could get away with it, that his companies had never been the subject of a strike, and that he consistently underpaid the union's employee pension and welfare funds. The information furnished by Mariani remained central to the government's case. At trial, the government argued that the jury could and should infer that Mariani made payoffs to the union because the union would not accord him favorable treatment if the union was not receiving some consideration in return. Evidence of union non-enforcement of the collective bargaining agreements was key to the government's case against the moving company operators. The information derived from Mariani's immunized testimony did not become mere background information because of the advent of Mr. Wagner. Wagner himself had extraordinary credibility problems, not the least of which was his concealment of relevant information and tape recordings from the prosecutors themselves until the eve of trial. Moreover, Wagner had no knowledge of Rotondo's 1974 intervention on Mariani's behalf.

To the extent that the prosecutors corroborated Giliberti's and Wagner's statements with Mariani's immunized testimony, the government violated the use immunity statute. In *United States v. Carpenter*, 611 F. Supp. 768, 779-80 (N.D. Ga. 1985), the court vacated a conviction on the ground that "the government has not established that the information given by [defendant] under promises of immunity has not been used by the government to confirm the truthfulness of what was

being told to them by cooperating witnesses." *Accord United States v. Hossbach*, 518 F. Supp. 759, 772 (E.D. Pa. 1980) (suppressing evidence against defendant where agent had conversation with another agent who had knowledge of defendant's immunized testimony because, "[e]ven if only confirmatory of [first agent's] suspicions, the conversation was important in the continuing investigation and surveillance of [defendant]"); *United States v. Dornau*, 359 F. Supp. 684, 689 (S.D.N.Y. 1973) (dismissing counts where court could not determine whether prosecutors used immunized testimony to "buttress" what they "already knew"), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974).

The government argues that, even if Mariani's immunized testimony corroborated Giliberti's statements, such confirmation should not be considered a use because defendant Mariani would have been indicted and prosecuted even if he had not testified. The Court of Appeals for this circuit, however, has held that information is "used" for purposes of 18 U.S.C. § 6002 even if the information is not the "legal cause" of the prosecution. *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976). Even if the corroboration provided by Mariani's testimony was not a "but for" cause of Indictment CR-86-00015, the government's use of confirmatory information nevertheless violates the use immunity statute.

The statute also prohibits the government from using immunized testimony to the government's "own advantage in the preparation of its case against [the witness]." *United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983); *accord United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (statute bars "derivative use" of testimony to focus investigation, decide what questions to ask at trial, determine which plea bargain to offer, interpret evidence, plan cross-examination, and otherwise plan trial strategy); *Matter of Archuleta*, 432 F. Supp. 583, 600 (S.D.N.Y. 1977) (quoting *McDaniel*). The

rationale for prohibiting such non-evidentiary uses of testimony is that permitting the government to use such information would put the immunized witness in a worse position than if the witness had not testfied. *Semkiw*, 712 F.2d at 895.

The government argues, however, that the Court of Appeals for this circuit in *United States v. King*, 560 F.2d 122, 132 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977), has held that use of an immunized witness' demeanor does not constitute taint. The decision is, however, not in point. In that case, an SEC "attorney-investigator" read an immunized witness' testimony after the grand jury indicted the witness "in order to see what kind of witness [he] would make." 560 F.2d at 132. Nothing in the decision suggests that the attorney-investigator played any role in the prosecution after the witness was indicted. In all events, the prosecutors' use of Mariani's immunized testimony went beyond use of his demeanor. Mariani's acknowledgement of his organized crime connection effectively foreclosed litigation on this key part of the government's case, as the prosecutors knew.

The government also argues that, even assuming that Mariani "corroborated" information supplied by Giliberti and Wagner and that the prosecutors drew inferences from Mariani's answers as to how he would defend himself, Indictment CR-86-00015 should not be dismissed because to do so would, in effect, transmute the use immunity statute into a transactional immunity statute. It bases this arguement on the ground that anytime a witness testifies under a grant of immunity, the prosecutor who conducts the inquiry will inevitably obtain some testimony that confirms what the government knows and gain an impression of the witness' ability to defend himself.

The government's argument is overstated. Section 6002 prohibits the government from using information derived from immunized testimony. While a witness'

testimony may, in the abstract, confirm other information or create an impression, the statute is not violated unless that information is used. Here, it is clear that the prosecutors relied upon their knowledge of Mariani's position and manner in proceeding to trial.

In all events, the decision that Mariani's testimony was misused in no way precludes the government from prosecuting witnesses who give immunized testimony. All it does is demonstrate that the "heavy burden" articulated in *Kastigar* is more difficult to meet when the attorneys who conduct the grand jury inquiry subsequently investigate and prosecute substantive charges against an immunized witness. The point is by no means a novel one. In cases in which the government has brought substantive charges against an immunized witness, the courts have frequently admonished the government to assign an attorney to the case who has had no contact with the immunized testimony. *See, e.g., Semkiw*, 712 F.2d at 895. Indeed, the United States Attorneys' Manual provides that, in order to prosecute a witness who has testified under immunity, the Attorney General must authorize the prosecution, and the attorney proposing the prosecution must explain

> "how he will show affirmatively that no ... 'non-evidentiary' use has been or will be made of the compelled testimony in connection with the proposed prosecution (for example, by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony)."

U.S. Attorneys' Manual §1-11.400 (quoted in *Semkiw* at 895). The government's argument that an attorney who questions an immunized witness is bound to use the testimony well illustrates the reason that the government and the courts recommend that a different prosecutor be

assigned to pursue the case against the immunized witness.[1]

Finally, the government argues that it would have been "highly impractical" to reassign this case to another attorney. Mr. Friedman testified that, because the conspiracy took place in the late 1970's and early 1980's and because of the size of the investigation, assigning a new attorney to the case would have created a substantial risk of "losing counts" to the statute of limitations. The government also notes that reassignment would have required substantial duplication of effort. Neither of these arguments is persuasive. While Indictment CR-85-00354, which charged Mariani with perjury and obstruction of justice, was returned in June 1985, a grand jury did not vote to indict Mariani on substantive charges until January 1986. The government had six months during which another attorney could have considered whether to charge Mariani with conspiracy to violate RICO, conspiracy to extort, and making payoffs. The fact that reassigning the case to another attorney would have entailed duplication of effort on the part of the government does not excuse the government's use of Mariani's immunized testimony. Courts have recognized that protection of a witness' fifth amendment privilege often results in the incursion of expenses and a loss of government efficiency. *See United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980). Indeed, in making this argument, the government appears to misperceive the fifth amendment interest at stake. The test enunciated in

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[1] This is not to suggest that the same prosecutor can never listen to immunized testimony and then prosecute the witness on substantive charges without violating the statute. As the government states, the question always is whether the government used the testimony. The decision here merely reflects the fact that the prosecutors here did use the testimony, not that a prosecutor who has contact with the immunized testimony is *per se* barred from prosecuting the witness. *See United States v. Pantone*, 634 F.2d 716 (3d Cir. 1980).

Kastigar permits no balancing of costs and benefits. Rather, it places a "total prohibition" on the use of immunized testimony against a witness. Government expediency is no basis for circumventing the statute's "sweeping proscription."

Accordingly, defendant Mariani's motion to dismiss Indictment CR-86-00015 is granted.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
August 17, 1987

/s/ _____
United States District Judge

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-833

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOMINIC MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing the indictment against petitioner on the ground that the government had made impermissible use of testimony given by petitioner before a grand jury.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit extortion, in violation of 18 U.S.C. 1951; making illegal payments to a union representative, in violation of 29 U.S.C. 186(a)(2); and making illegal payments to influence the operation of an employee benefit plan, in violation of 18 U.S.C. 1954. He was sentenced to concurrent four-year terms of imprisonment, to be served consecutively to a sentence imposed on a separate conviction.

On August 17, 1987, after a post-trial evidentiary hearing pursuant to *Kastigar* v. *United States,* 406 U.S. 441 (1972), the district court vacated petitioner's convictions and dismissed the indictment against him. The court ruled that, in obtaining the conviction, the government had made impermissible non-evidentiary use of the testimony that petitioner had given to a grand jury under a grant of immunity (Pet. App. 17a-30a).

The court of appeals reversed and remanded the case for reinstatement of the verdict of conviction and for sentencing (Pet. App. 1a-14a). The court concluded that the district court's findings regarding the government's alleged non-evidentiary use of petitioner's immunized testimony were erroneous and that the uses the government allegedly made of the testimony were insubstantial.

Petitioner contends (Pet. 19-24) that the decision of the court of appeals permits the non-evidentiary use of immunized testimony and incorrectly construes both the federal immunity statute, 18 U.S.C. 6002, and this Court's leading decision dealing with the use of immunized testimony, *Kastigar* v. *United States,* 406 U.S. 441 (1972). Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss the indictment. If, after reinstatement of the conviction and sentencing by the district court, the court of appeals were to reverse petitioner's conviction and remand for a new trial because of trial error, petitioner's immunity claims might be mooted by an acquittal following a second trial on the merits. If, on the other hand, the court of appeals affirms his conviction, petitioner will be able to present his *Kastigar* claim to this Court, together

with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699:00009

No. 88-833

(3)

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1988

DOMINIC MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the government made improper use of petitioner's immunized grand jury testimony.

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-833

DOMINIC MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 851 F.2d 595. The opinion of the district court (Pet. App. 17a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1988. A petition for rehearing was denied on September 20, 1988. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on November 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to participate in the affairs of an

enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit extortion, in violation of 18 U.S.C. 1951; making illegal payments to a union representative, in violation of 29 U.S.C. 186(a)(2); making illegal payments to influence the operation of an employee benefit plan, in violation of 18 U.S.C. 1954; perjury, in violation of 18 U.S.C. 1623(a); and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to concurrent four-year terms of imprisonment on the racketeering, extortion, and illegal payment counts, to be served consecutively to concurrent one-year sentences on the perjury and obstruction of justice counts. After a post-trial evidentiary hearing to determine whether the government had improperly used testimony that petitioner gave to a grand jury under a grant of immunity pursuant to 18 U.S.C. 6002, the district court vacated petitioner's convictions on the racketeering, extortion, and illegal payment counts (Pet. App. 17a-30a). The court of appeals reversed and reinstated the convictions (*id.* at 1a-14a).

1. In 1982, Anthony Giliberti, a witness for the prosecution at petitioner's trial, told federal prosecutors about a longstanding criminal enterprise involving the commercial moving business in New York City. Giliberti had worked for Teamsters Local 814, a corrupt local union. He said that petitioner, who owned or operated two moving companies, had made payoffs to Jimmy Rotondo, a member of a New York organized crime family that was involved with Local 814. As a consequence, petitioner was permitted to use nonunion labor and to remain delinquent in his payments to the union pension and welfare funds. Pet. App. 6a-7a.

Petitioner was called before a grand jury in 1983. He testified that he had been in the moving business in New York City since 1952 and that Local 814 had represented

his companies' employees. Asserting his privilege against compulsory self-incrimination, petitioner refused to say whether he knew Rotondo or whether he had made payoffs to Rotondo or representatives of Local 814. Pet. App. 5a.

In August 1984, petitioner testified before the same grand jury pursuant to a grant of immunity under 18 U.S.C. 6002.[1] He admitted that his companies had used nonunion labor and had been delinquent in making payments to Local 814's pension and welfare funds, but had not been subjected to a strike that affected other moving companies. He also testified that he knew Giliberti and Rotondo. He denied making payoffs to either of them or to anyone else associated with Local 814, however. Pet. App. 5a-6a.

In December 1984, Warren Wagner, who was also a witness for the prosecution at petitioner's trial, supplied additional information to federal prosecutors concerning corruption in the New York moving business. Wagner, the chief executive of one of petitioner's competitors, stated that throughout the 1970s his company, petitioner's company, and two other moving companies engaged in various bid-rigging schemes and that they had all made payoffs to Local 814 at various times. Petitioner was subsequently indicted along with a number of other movers, officials of Local 814, and organized crime figures. Pet. App. 7a-8a.

Petitioner was charged and convicted following a six-month trial on the racketeering and extortion counts and

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[1] Section 6002 provides "use" immunity rather than broader "transactional" immunity. The statute states that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

the counts alleging that he made corrupt payoffs to union officials. Those are the counts he now challenges. He was also charged and convicted of perjury and obstruction of justice in connection with his immunized grand jury testimony. Those counts are not at issue here. Pet. App. 17a, 20a.

2. Following the trial, the district court held a hearing to determine whether the government had made improper use of petitioner's immunized testimony. The district court concluded that the government had not made any evidentiary use of the immunized testimony. The district court also concluded that petitioner would have been indicted in the absence of his immunized testimony. Pet. App. 26a. Nevertheless, the district court vacated all of petitioner's convictions except those for perjury and obstruction of justice.

Relying on *Kastigar* v. *United States,* 406 U.S. 441 (1972), where this Court upheld the constitutionality of Section 6002, the district court first noted that the statute was "designed to leave the witness who is compelled to testify in substantially the same position as if the witness had not testified." Pet. App. 22a. The court then concluded that the government had used the immunized testimony in three ways. First, petitioner's admission that he knew Rotondo ensured that petitioner "could not deny at trial a key part of the government's evidence without risking another perjury prosecution." *Id.* at 24a. Second, petitioner's testimony improperly "corroborated" Giliberti's and Wagner's testimony, the district court concluded, even though it was not used at trial and even though petitioner would have been indicted if he had not given the immunized testimony. *Id.* at 24a-26a. Third, the prosecutors (correctly) concluded, based in part on petitioner's immunized performance before the grand jury, that he was such

a bad witness that he would not be called as a witness in his own defense. *Id.* at 20a-21a.

3. The court of appeals reversed and remanded for reinstatement of the jury's verdict. It noted that "[t]he evidence given by Giliberti * * * and Wagner was quite sufficient to indict [petitioner] and convict him of racketeering conspiracy" (Pet. App. 9a) and that "the evidence used at [petitioner's] trial was derived from sources entirely independent of any immunized testimony given by [petitioner]" (*id.* at 12a). In these circumstances, the court concluded, "we cannot see how the government prosecutors' knowledge of [petitioner's] immunized testimony could be considered impermissible use of that testimony." *Ibid.*

With respect to the district court's conclusion that the government had improperly used petitioner's testimony that he knew Rotondo, the court of appeals stated that the "short answer is that the government simply did not use" that statement at trial, but relied on Giliberti and Wagner to tie petitioner to Rotondo. Pet. App. 12a. Similarly, the court of appeals concluded that petitioner's admissions about corruption in the New York City moving business "were in no sense used to corroborate Giliberti and Wagner." *Id.* at 13a. Finally, with respect to the district court's conclusion that the prosecution had improperly used petitioner's immunized testimony because the prosecutors had decided that based on petitioner's performance they did not need to prepare to cross-examine him, the court stated that it could "not see how the prosecutor's judgment that [petitioner] would not take the stand can be considered a use of the immunized testimony." *Ibid.* The court added: "Were these supposed non-evidentiary uses of [petitioner's] immunized testimony found to be so impermissible that they barred prosecution thereafter for the matters covered by the witness, it would be impossible ever

to prosecute a witness for such matters, once the witness had given immunized testimony." *Ibid.*

ARGUMENT

1. As we observed in our memorandum in opposition filed in December 1988, this case is at present in an interlocutory posture. After the district court reinstates the jury verdict, the court of appeals will review the case for trial error if petitioner appeals. For this reason, the case does not warrant review by this Court at this time.

2. In any event, the court of appeals did not err. It is undisputed that the prosecution did not make any evidentiary use of petitioner's immunized testimony, and it is also undisputed that petitioner would have been indicted and convicted whether or not he had given his immunized testimony. Pet. App. 9a, 26a. In these circumstances, petitioner's convictions should not be reversed.

That is especially so since the "uses" that the district court concluded the government made of petitioner's immunized testimony are so insubstantial. No use at all was made of petitioner's admission that he knew Rotondo and his statements describing the corrupt operation of the moving business in New York City, except perhaps to further confirm the merits of the case in the prosecutors' minds. But where, as here, the defendant would have been indicted anyway, that "use" is immaterial, as it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar* v. *United States,* 406 U.S. at 462. Similarly, as the court of appeals stated, the prosecutors' decision not to prepare to cross-examine petitioner "could not have strengthened the government's case." Pet. App. 13a.

Petitioner suggests (Pet. 19) that, under the decision below, "the government could routinely enjoy a prospective criminal defendant's deposition before indictment." But there is no basis for any suggestion that the prosecutors acted other than in good faith in immunizing petitioner.[2] Moreover, as the court of appeals concluded, petitioner's "convictions are the result of his choosing to deny, under oath, any knowledge or any part in the conspiracy. Instead of * * * telling the truth when sworn before the grand jury, he elected to deceive and obstruct. He thus ran the risk that others would tell the story and implicate him." Pet. App. 13a.

3. Nor is there any merit to petitioner's suggestion that review is warranted to resolve a conflict in the courts of appeals. Two of the four cases on which petitioner relies, *United States* v. *Crowson,* 828 F.2d 1427 (9th Cir. 1987), cert. denied, 109 S.Ct. 87 (1988), and *United States* v. *Byrd,* 765 F.2d 1524 (11th Cir. 1985), offer him no support at all, as the courts of appeals affirmed criminal convictions in those cases. The court in *Crowson* stated, consistent with the decision below: "[I]f the government can prove a prior, independent source for its evidence, then the non-evidentiary purposes of trial strategy, etc., would seemingly have been developed anyway. Thus, any non-evidentiary use of the immunized testimony would have been inevitable and harmless in any regard." 828 F.2d at

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[2] Petitioner suggests (Pet. 23 n.7) that the government should have replaced the attorneys who elicited petitioner's immunized grand jury testimony with other attorneys at his trial. While that course of action would have avoided any question as to the possible improper use of petitioner's immunized testimony, it would have seriously disrupted the investigation in this case. Whatever the wisdom of using new prosecutors where it is practical to do so, there is no rule that an attorney who is exposed to some immunized testimony is forbidden from prosecuting at trial, as the district court noted (Pet. App. 29a n.1).

1432. Similarly, the court in *Byrd* held that "[s]o long as none of the evidence presented to the grand jury is derived, directly or indirectly, from the immunized testimony, it can fairly be said that the defendant's immunized testimony has not been used to incriminate him. * * * If and when the government seeks to elicit or introduce evidence indirectly derived from Byrd's testimony * * *, the government would have the burden of showing by a preponderance of the evidence * * * that the evidence adduced was derived from independent sources." 765 F.2d at 1530-1531. Nor does *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983), conflict with the decision here. The court of appeals there merely concluded that it did not know what use the government had made of immunized testimony, and therefore remanded "to the district court so that it may conduct an evidentiary hearing." *Id.* at 895.

Finally, review is not warranted on account of any tension between the decision below and the decision in *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973). In that case, which did not involve a grant of use immunity under Section 6002, the prosecutor read transcripts of the defendant's immunized testimony before a state court grand jury while unaware that under the applicable state law the defendant had transactional immunity with respect to that testimony. As the court of appeals here recognized (Pet. App. 11a), the court in *McDaniel* did not hold that any nonevidentiary use of immunized testimony, no matter how insubstantial, is proscribed. Rather, the court in *McDaniel* reasoned that, because the prosecutor in that case was unaware that the defendant's prior testimony was immunized, he had no reason to segregate his testimony from his other sources of information, and could not carry his burden of showing that the testimony had not been

used improperly.[3] The court below added that, "[t]o the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning." *Ibid.* Since *McDaniel* need not be read to require such a result (and thereby virtually convert "use" immunity into "transactional" immunity), there is no reason for this Court to review the correct decision of the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SIDNEY M. GLAZER
Attorney

MARCH 1989

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[3] In addition, the defendant's attorney in *McDaniel* urged him to "fully divulge all his illegal actions" to the grand jury because the state statute gave him transactional immunity, and the defendant "gave self-incriminating testimony filling three volumes of transcript." 482 F.2d at 307. Here, in contrast, petitioner did not fully divulge his knowledge of the corruption in the New York City moving business, but instead lied to the grand jury.

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No.: 88-833

IN THE

Supreme Court of the United States

October Term, 1988

DOMINIC MARIANI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212) 486-1717

On the Petition
JUDD BURSTEIN
757 Third Avenue
New York, New York 10017
(212) 826-1200

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BRIEF FOR PETITIONER IN REPLY

INTRODUCTION

Dominic Mariani respectfully submits this brief in reply to the government's brief in opposition to his petition for a writ of certiorari.

ARGUMENT

The government erroneously contends that there is no significant split among the Circuit Courts on the issue of non-evidentiary uses of immunized testimony because "two of the four cases on which petitioner relies ... offer him no support at all." (Government brief at 7) The government is wrong. Notwithstanding the fact that convictions were affirmed, both *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 87 (1988), and *United States v. Byrd*, 765 F.2d

1524 (11th Cir. 1985), offer strong support for petitioner's claims.

In *United States v. Byrd, supra*, the Court rejected Mariani's position only to the extent that it rejected the defendant's claim that his immunized testimony had played a part in the prosecutor's motive for seeking an indictment against him. However, the Court also noted that *Kastigar v. United States*, 406 U.S. 441 (1972), bars the prosecution from "deriv[ing] some benefit in the preparation of the case by virtue of ... the immunized testimony." 765 F.2d at 1531-32.

Significantly, the government in *Byrd* took precisely the steps that should have been taken here. That is, a separate prosecutor was appointed to present the case against Byrd to a grand jury other than the one that had heard his immunized testimony. Hence, the defendant's complaint in *Byrd* was far more speculative: that the prosecutor who had questioned him in the grand jury participated in the decision to seek an indictment. Here, of course, the District Court found other uses of testimony from which the government derived "some benefit in the preparation of the case...." *Id.* Hence, application of *Byrd* to the facts of this case would require dismissal of the RICO indictment against Mariani.

Similarly, in *United States v. Crowson, supra*, the Court also agreed with our view of *Kastigar*, and rejected the defendant's immunity claim only because "the record is silent as to the prosecution's ... use of the immunized testimony for other non-evidentiary purposes such as planning cross-examination, interpreting evidence, and otherwise generally planning trial strategy." 828 F.2d at 1431. Here, in contrast, the record is not silent. Alan Friedman admitted that Mariani's immunized testimony caused him not to prepare for cross-examination. Similarly, the District Court found that the government made significant corroborative use of Mariani's testimony.

On these facts, the *Crowson* Court would have ruled in the defendant's favor. *See United States v. Carpenter*, 611 F.Supp. 768, 780 (N.D.Ga. 1985) ("Further, the government has not established that the information given by Carpenter under promises of immunity has not been used by the government to confirm the truthfulness of what was being told to them by cooperating witnesses."); *see also United States v. Tormos-Vega*, 656 F.Supp. 1525, 1531 (D.P.R. 1987).

Hence, contrary to the government's claims, there is a clear conflict between the Second Circuit and its sister Courts of Appeals. This being so, review of the issue by this Court would be appropriate

CONCLUSION

Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212)486-1717

On The Petition
JUDD BURSTEIN
757 Third Avenue
New York, New York 10017
(212)826-1200